In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
JERRY SWINDLE	)	
(Chapter 7 Case 91-41653)	)	Number 93-4073
	)	
Debtor	)	
	)	
	)	
	)	
GEORGIA SWINDLE	)	
	)	
Plaintiff	)	
	)	
	)	
	)	
v.	)	
	)	
JERRY SWINDLE	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

The trial of the above-captioned adversary proceeding was held August 10, 1993. After consideration of all of the evidence and applicable authorities I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The parties to this action are formerly husband and wife and were divorced

in a proceeding in the Superior Court of Chatham County, Georgia, on or about July 19, 1991. The parties entered into a separation agreement which made no mention of any payments to the wife denominated as alimony. The agreement was incorporated into the final decree of the Superior Court and the portion which is in issue provides as follows:

> There is a home and real property located at 1105 West 51st Street, Savannah, Chatham County, Georgia, vested in which is approximately Eleven Thousand Five Hundred ($11,500.00) Dollars equity, as such it is the desire of the parties that the husband retain said home and all indebtedness currently thereon, however: The husband agrees to pay off the Federal Tax Lien in the amount of Seven Thousand One Hundred Nine Dollars and Sixty-two cents ($7,109.62) plus interest and penalties, in full, and in addition pay to the wife the sum of Two Thousand Five Hundred ($2,500.00) Dollars as full and final settlement of the wife's claim to said home and real property.
>
> The wife agrees that upon her receipt of the Two Thousand Five Hundred ($2,500.00) Dollars she will execute any and all legal documents, instruments and the like, in order to effectuate the removal of her name from the title and mortgage on said property.

See Defendant's Exhibit "5."

The Plaintiff contends that the payment of $2,500.00 called for in the settlement agreement, although not denominated as alimony, is actually in the nature of support and should be excepted from the Debtor's discharge pursuant to the provisions of 11 U.S.C. Section 523(a)(5).

The Plaintiff contended that there was a great disparity in the parties' income at the time of the divorce and under applicable principles governing support- related dischargeability questions, that disparity in income should be considered a major determining factor. Specifically she testified that at the time of the divorce Debtor's gross income was $28,000.00 to $30,000.00 per year and her's was $15,000.00 to $16,000.00. She asserts that the money was intended to help her get relocated since the husband retained possession of the residence and as a result was actually in the nature of support. The husband, however, testified that his income was substantially lower than the wife's. He testified that she made between $25,000.00 and $30,000.00 a year and that while he grossed approximately the same amount of money in his businesses, his net income was only about $6,000.00 per year.

Because the issue of disparity in income is such a fundamental element of this case, I left the record open for thirty (30) days in order for the parties to file copies of their tax returns for the calendar year 1990, the last year in which the parties lived together as husband and wife. Subsequently on September 7, 1993, Plaintiff's counsel filed her 1990 income tax return which revealed total income for 1990 of $6,785.00, adjusted gross income of $6,305.00 and taxable income, after deductions, of $1,005.00. Debtor has failed to file a copy of his 1990 income tax return, however, the court had admitted into evidence at the trial of the case an income statement which Debtor filed under oath in connection with the divorce proceeding as required by the Local Rules of Superior Court. In that affidavit the Debtor showed net monthly income of $994.24 (Exhibit D-4). Attached to that affidavit Defendant showed income statements of his two businesses which supported that income

figure. On a twelve month basis, I therefore find that Debtor's income for the calendar year 1990 amounted to $11,990.88. Furthermore, based on the information contained in Plaintiff's 1990 tax return I find her total income to be $6,785.00.

CONCLUSIONS OF LAW

11 U. S. C. Section 523(a)(5)[1] creates an exception from discharge of any debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child . . . ", but only if the debt is "actually in the nature of alimony, maintenance, or support". There is ample controlling authority in the Eleventh Circuit and the Southern District of Georgia in interpreting and applying 11 U.S.C. Section 523(a)(5).[2] The Eleventh Circuit has made it clear that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state law". Harrell, 754 F.2d at 905 (quoting H. R. Rep. No. 595, 95th Cong., 1st Sess. 364 (1977)

[1] 11 U.S.C. Section 523(a)(5) provides that:

> (a) A discharge . . . does not discharge an individual debtor from any debt--
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . ; or
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

[2] In re Harrell, 754 F.2d 902 (11th Cir. 1985); Matter of Crist, 632 F.2d 1226 (5th Cir. 1980), cert. denied, 451 U.S. 986 (1981) cert. denied, 454 U.S. 819 (1981); In re Holt, 40 B.R. 1009 (S. D. Ga. 1984) (Bowen, J.); In re Bedingfield, 42 B.R. 641 (S. D. Ga. 1983) (Edenfield, J.).

reprinted in 1978, U. S. Code Cong.& Admin. News 5787, 6319). To be held non-dischargeable, the debt must have been actually in the nature of alimony, maintenance, or support. Harrell, 754 F.2d at 904. A determination is made by examining the facts and circumstances existing at the time the obligation was created, not at the time of the bankruptcy petition. Harrell, 754 F.2d at 906.[3]; Accord Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); Draper v. Draper, 790 F.2d 52 (8th Cir. 1986); In re Comer, 27 B.R. 1018, 1020-21 (9th Cir. BAP 1983), aff'd on other grounds, 723 F.2d 737 (9th Cir. 1984). Contra, Long v. Calhoun, 715 F.2d 1103 (6th Cir. 1983). It is the substance of the obligation which is dispositive, not the form, characterization, or designation of the obligation under state law. Bedingfield, 42 B.R. at 645-46; Accord Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); Williams v. Williams, 703 F.2d 1055, 1057 (8th Cir. 1983); Calhoun, 715 F.2d at 1109 Pauley v. Spong, 661 F.2d 6, 9 (2nd Cir. 1981). The Harrell court stated:

> The language used by Congress in §523(a)(5) requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is "actually in the nature of alimony, maintenance, or support". The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the nature of support. The language does not suggest a precise inquiry into financial circumstances to determine precise levels of need or support; nor does the statutory language contemplate an ongoing assessment of need as

[3] In rejecting the analysis in In re Warner, 5 B.R. 434 (Bankr. D. Utah, 1980), Harrell overrules Bedingfield only to the extent that it held that "the bankruptcy courts may examine the debtor's ability to pay . . . at the time of the bankruptcy proceeding". Bedingfield 42 B.R. at 646. The fact that the circumstances of the parties may have changed from the time the obligation was created is not relevant to the inquiry which the bankruptcy court must undertake in a §523(a)(5) action. Harrell, 754 F.2d at 907. In all other respects, Bedingfield remains controlling authority in this jurisdiction.

> circumstances change. 754 F.2d at 906 (emphasis original).

In analyzing this portion of the Harrell opinion, it is clear that only "a simple inquiry as to whether the obligation can legitimately be characterized as support" is needed. While the court did find that bankruptcy laws, not state law is controlling, it did not explicitly fashion guidelines or otherwise set forth factors to be used in resolving the required "simple inquiry".[4] The controlling law in this Circuit decided under Section 17(a)(7) of the Bankruptcy Act[5] suggests that the threshold inquiry "requires a determination of the intention of the parties, as reflected by the substance of the agreement, viewed in the crucible of surrounding circumstances as illuminated by applicable state law". Crist, 632 F.2d at 1229; Accord Holt, 40 B.R. at 1012; Bedingfield, 42 B.R. at 646. In determining the "intention of the parties", reference to state law does not violate the clear mandate that bankruptcy law, not state law, controls. See Holt 40 B.R. at 1011 ("There is no federal bankruptcy law of alimony and support. Such obligations and the rights of the parties must be devined [sic] by reference to the reasoning of the well-established law of the states."); See also Bedingfield, 42 B.R. at 645-46 ["While it is clear that Congress intended that federal law not state law should control the determination of when a debt is in the nature of alimony

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[4] Although the court did not set forth a laundry list of factors which the bankruptcy court should consider, it did state that a "precise inquiry into financial circumstances to determine precise levels of need or support" is not required. Furthermore, the court rejected the reasoning of those courts which conclude that an ongoing assessment of need is required. 754 F.2d at 906. These limitations on the §523(a)(5) inquiry reflect the court's concern for considerations of comity. 754 F.2d at 907.

[5] Section 17(a)(7) of the Bankruptcy Act provides in relevant part:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . are for alimony due or to become due, or for maintenance or support of wife or child . . .

or support, it does not necessarily follow that state law must be ignored completely . . . . The point is that bankruptcy courts are not bound by state law where it defines an item as alimony, maintenance or support, as they are not bound to accept the characterization of an award as support or maintenance which is contained in the decree itself." (Citations omitted.)]; Accord Spong, 661 F.2d at 9. In addition to the state law factors used in determining alimony, the federal courts have employed a number of factors to determine whether the debt is actually in the nature of alimony, maintenance, or support. These factors include:

1) If the circumstances of the parties indicate that the recipient spouse needs support, but the divorce decree fails to explicitly provide for it, a so called "property settlement" is more in the nature of support, than property division. Shaver, 736 F.2d at 1316.

2) "[T]he presence of minor children and an imbalance in the relative income of the parties" may suggest that the parties intended to create a support obligation. Id. [citing In re Woods, 561 F.2d 27, 30 (7th Cir. 1977).]

3) If the divorce decree provides that an obligation therein terminates on the death or remarriage of the recipient spouse, the obligation sounds more in the nature of support than property division. Id. Conversely, an obligation of the donor spouse which survives the death or remarriage of the recipient spouse strongly supports an intent to divide property, but not an intent to create a support obligation. Adler v. Nicholas, 381 F.2d 168

(5th Cir. 1967).

4) The characterization of the obligation applied in state court is entitled to the greater deference where it is based upon findings of fact and conclusions of law stemming from actual litigation of a divorce rather than from judicial approval of an uncontested divorce settlement. In re Hall, 40 B.R. 204, 206 (Bankr. M.D.Fla. 1984).

5) Finally, to constitute support, a payment provision must not be manifestly unreasonable under traditional concepts of support taking into account all the provisions of the decree. See In re Brown, 74 B.R. 968 (Bankr. D.Conn. 1987) (College or post-high school education support obligation upheld as non-dischargeable).

The non-debtor spouse has the burden of proving that the debt is within the exception to discharge. Calhoun, 715 F.2d at 1111.

After consideration of the evidence in light of the above authorities, I conclude that Debtor's obligation to pay the sum of $2,500.00 to the Plaintiff is non-dischargeable. Clearly neither party enjoyed substantial income at the time the divorce was entered. Nevertheless the disparity in income is significant in that the husband's income was approximately double that of the wife's. Moreover, because the husband retained possession of the home, in which the parties believed there was significant equity, necessitating the wife incurring expenses to relocate and obtain a place to live, I find that the intent of the parties

was to help defray her expenses of relocation and finding suitable housing. Because housing is a necessity, the sum contemplated by the parties as necessary to enable her to acquire it, I find it to be actually in the nature of support within the meaning of 11 U.S.C. Section 523(a)(5).

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Plaintiff is entitled to a judgment determining the Debtor's obligation to pay her the sum of $2,500.00 to be unaffected by any discharge entered in this Debtor's Chapter 7 proceeding.

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Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of September, 1993.